IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 522 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SURESHBHAI SHANKARLAL THAKKAR

Versus

COMMISSIONER OF POLICE

Appearance:

1. Special Civil Application No. 522 of 2004

MS BANNA S DUTTA for Petitioner No. 1

MR AY K0GJE, AGP for Respondent No. 1,3

RULE SERVED for Respondent No. 1,2

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 08/07/2004

ORAL JUDGEMENT

By filing this petition, the petitioner-detenu has challenged his detention order dated 27-12-2003. By

the said order, the petitioner is detained as a "bootlegger" under P.A.S.A. Along with the order of detention, petitioner is also served with the grounds of detention. In the grounds of detention, there is a reference about three criminal cases registered against the petitioner before Karelibaug Police Station. All these cases are registered under Bombay Prohibition Act. So far as last case is concerned, the same is registered on 25th December, 2003. Over and above those cases, the detaining authority has considered statements of two witnesses, whose names have not been disclosed to the petitioner. After satisfying itself subjectively, the detaining authority has passed the order of detention, which is impugned in this petition.

2) It is submitted by Ms.Dutta, learned advocate for the petitioner that the detaining authority has arbitrarily exercised powers under Section 9 (2) of the Act, by not disclosing names of so called secret witnesses. It is submitted by her that before exercising powers under Section 9 (2) of the Act, the detaining authority should have reached subjective satisfaction to the effect that the statements are required to be kept in secret in view of the public interest and while doing that exercise, the detaining authority was required to consider antecedents and character of the detenu and the witnesses. In this connection reference is made to the decision of learned Single Judge of this Court rendered in RANUBHAI BHIKHABHAI BHARWAD (VEKARIA) v. STATE OF GUJARAT reported in 2000 (3) GLR 2696.

3) Mr.A.Y.Kogje, learned AGP, submitted that the detaining authority has reached the subjective satisfaction and the authority has also recorded such satisfaction on the file by clearly mentioning that the detenu is a very high-handed person and if the names of witnesses are disclosed, it may put the life of such witnesses in danger.

4) As the subjective satisfaction is recorded by the detaining authority, I do not find any substance in the first contention raised by Ms.Dutta, learned advocate for the petitioner.

5) It was next argued on behalf of the petitioner that the last incident registered against the petitioner is of 25th December, 2003 and in that case the petitioner was released on bail on 26th December, 2003. The said order granting bail was also made available to the detenu at the time, when the papers were given to the detenu for making representation. The said bail order is at page 56

of the compilation. Therefore, it is clear that the petitioner is released on bail on 26th December, 2003, i.e., on the next day of the incident. It is submitted by Ms.Dutta, learned advocate for the petitioner that when the petitioner was released on bail on 26th December, 2003, naturally, the Sponsoring Authority must not have made proposal for detaining the petitioner before that date. She submitted that on the next date, i.e., on 27th December, 2003 the detaining authority has detained the petitioner under prevention detention. She further submitted that, under these circumstances, it is not possible to believe that within such a short time the detaining authority may have gone through the records and may have recorded the statements of secret witnesses, therefore, the detention order is passed in a hurry and it can be presumed that the detaining authority has passed such order without going through the record. In order to substantiate the aforesaid argument, she has relied upon the decision of this Court rendered in KALIDAS CHANDUBHAI KAHAR v. STATE OF GUJARAT & ORS. reported in 1993 (2) GLR 1659, wherein it is observed as under in para 6 :

"His second contention is that the detaining authority has wrongly exercised the powers under Sec.9 (2) of PASA Act and by such wrong exercise of powers the detenu, right to make a representation under Art.22 (5) of the Constitution has been infringed. He further elaborates his submission by pointing out that the statements of the witnesses have been recorded on 16th October, 1992 and that the said statements have been verified by the Superintendent of Police, C-Division, Baroda City on 16th October, 1992. It has been pointed out by the learned A.G.P. Mr.Y.M.Thakkar that the proposal in the case was made on 16th October, 1992 and the order of detention was passed on 17th October, 1992. It is rather curious that the entire bunch of material was supplied by the sponsoring authority at the time of making the proposal and that has been promptly accepted by the detaining authority and passed the order on the next day itself. At the time of exercising the privilege under Sec.9 (2) of PASA, a balance is required to be struck between the public interest on the one hand and the right of the detenu to make a representation under Art.22(5) of the Constitution on the other. If the statements of the witnesses are to be relied on, they must be genuine statements of the real

persons. The detenu would like to verify as to whether these persons are fictitious persons or not and/or whether their statements are bogus statements or not ? Unless the detenu knows the names and addresses of the persons who have given the statements, he cannot verify the aforesaid facts and if the names and addresses along with the contents of the statements are supplied to the detenu, he can have full opportunity to verify the position and make an effective representation on that basis. As against this, there is a provision under Sec.9 (2) carved out on the basis of Art.22 (5) of the Constitution which provides that nothing in sub-sec. (1) shall require the authority making such order to disclose facts which it considers to be against the public interest to disclose. Therefore, it is the duty of the detaining authority to strike a balance as stated above, that in the public interest, the names and addresses of the witnesses could not be disclosed. This should not be treated as an idle formality as it affects the public interest on the one hand and the right of the detenu on the other. When that is so, the detaining authority is expected to do some exercise before actually exercising the privilege under Sec.9 (2) of PASA. Looking to the facts and circumstances of the case, it is clear, as stated hereinbefore, that the verified statements were also placed before the detaining authority and there was no sufficient time for the detaining authority to examine the possibility of exercising the power under Sec.9 (2), as the proposal was made on 16th October, 1992 and the order of detention was passed on the following day, i.e., 17th October, 1992, nor is there any material to show as to how he examined the necessity of exercising the power under Sec.9 (2). Under these circumstances, in our view, it is a wrong exercise of power under Sec.9 (2) which has affected the detenu's right of making an effective representation under Art.22 (5) of the Constitution of India and therefore, the continued detention of the detenu is bad and illegal and the impugned detention order is required to be quashed and set aside."

6) Mr.Kogje, learned AGP, after going through the file of the case, submitted that the sponsoring authority has sent proposal on 25th December, 2003 and on 27th December, 2003, the order of detention was passed,

therefore, the detaining authority had two days for going through the entire papers. However, he has frankly pointed out that while sending such proposal on 25th December, 2003 the sponsoring authority has also mentioned that the petitioner is already released on bail in connection with all the three cases. It is surprising to know that as to on what basis such statement is made by the sponsoring authority, as the petitioner is released on bail in connection with third case on 26th December, 2003. It is also very surprising to note that even the bail application was preferred on 26th December, 2003 and on such application order is also passed on the same day, which is clearly established from the documentary evidence at page 56. Therefore, it is clear that when the sponsoring authority sent the proposal on 25th December, 2003, the petitioner had not even moved any bail application, even then it is mentioned in the report submitted to the detaining authority that the petitioner is already released on bail in all the three cases.

7) Under the law of preventive detention a person is detained without trial, therefore, the question of liberty of a citizen is involved, hence, whatever factual position, which is required to be placed before the detaining authority, should be correct one. Sending proposal by the sponsoring authority and passing the order of detention by the detaining authority can never be said to be an idle formality. In the present case, even though the petitioner was released on bail on 26th December, 2003, while sending proposal on 25th December, 2003 to the detaining authority reference is made about the release of the petitioner on bail in connection with all three cases and, on the basis of this information the detaining authority has passed the detention order. This, itself shows total non application of mind on the part of the authority in passing the order of detention. Therefore, the subjective satisfaction arrived at by the authority stands totally vitiated. On this ground, this petition is required to be allowed.

8) For the foregoing reasons, this petition is allowed. The order of detention dated 27-12-2003 is quashed and set aside. The detenu, Shri Sureshbhai Shankarlal Thakkar is ordered to be set at liberty forthwith, if he is not required in connection with any other case. Rule is made absolute.

(P.B.Majmudar,J.)
/malek